

*We are all servants of the laws to the end
that it may be possible for us to be free.
Cicero, Pro Cluentio, 66 B.C.*

**PROCEDURAL MEMORANDUM
(Revised as of March 21, 2003)**

TO: Counsel and Parties

FROM: Judge Marcia S. Krieger

These procedures are designed to facilitate the fair, prompt, efficient and economical disposition of all matters in this courtroom and will be revised from time-to-time (usually once or twice per year). In that regard, I invite your comments and constructive suggestions for their improvement by letter outside the context of and without reference to any given matter. In addition, I rely upon your familiarity and compliance with these procedures to accomplish these objectives. Thank you, in advance, for your cooperation.

I. GENERAL

A. Applicable Rules.

Those appearing in the District Court should be familiar with and adhere to:

- The Federal Rules of Civil Procedure,
- The Federal Rules of Criminal Procedure,
- The Federal Rules of Evidence,
- The United States District Court for the District of Colorado Local Rules of Practice.

B. Communication with Chambers.

- 1) **Questions.** Questions regarding procedures or scheduling may be directed to **Janine Aguero** at (303) 335-2289 or **Valeri Barnes** at (303) 335-2087. **Please do not call the law clerks on procedural or scheduling matters. They may speak to counsel only pursuant to my specific instructions.**
- 2) **Captions:** All parties shall be listed on all captions, preferably showing crossclaims, counterclaims, etc. “Et al.” and other abbreviated forms of captions are not permitted.

- 3) **Use of Facsimile or Electronic Transmission.** Parties may consent to service by facsimile or electronic means in accordance with Amended Administrative Order 2001-9 and D.C.COLO.LCivR 5.2 or D.C.COLO.LCrR 49.2. If such election is made, we will endeavor to serve orders and notices in the specified case in the manner you have designated. The election, however, does not authorize you to file pleadings or correspondence by electronic means. All pleadings must be filed in the Clerk's office.

From time-to-time you may be directed to transmit proposed orders or other documents by facsimile to (303) 335-2283 or by electronic mail to: krieger_chambers@cod.uscourts.gov. If e-mail is used, the document should be submitted as an attachment in Word or WordPerfect format. The e-mail message must identify the case number and document attached.

- 4) **Courtesy Copies.** Filing of a pleading in the Clerk's office is required. However, from time-to-time there may be delays in the transmission of a pleading from the Clerk's office to chambers. **If the pleading filed will require a hearing to be conducted within the following five business days or will require prompt action or consideration by the Court, please mark the copy given to the Clerk for "immediate delivery to chambers" and call chambers to confirm delivery. You may also use the e-mail address to transmit a PDF version of the pleading noting the date and time it was filed.**
- 5) **Settlement and Continuance of Hearings/Trials.** **Except in criminal matters, no hearing/trial is vacated without a written order.** Therefore, unless you have a written order or have been advised by chambers staff that one has been issued, a scheduled matter will be heard. Requests for continuance or vacation of hearings or trials, based on settlement or otherwise, must be made in writing and **filed at least two court days before the scheduled matter, along with a proposed order and a courtesy copy of the motion either hand-delivered or transmitted by e-mail.** (See ¶ 4, above.)

Motions for continuance based solely on inconvenience, schedule conflicts or press of other business when multiple attorneys have entered appearances will not be granted. Hearings, trials and pretrial preparation deadlines generally will not be extended or vacated in order to facilitate settlement negotiations or alternative dispute resolution.

If a settlement resolves the entirety of a case eliminating the need for a trial, the trial will be vacated only if pleadings sufficient to fully resolve the case (motion, stipulation and proposed order) are filed with the Court no later than **5:00 p.m. two business days before the trial** and a courtesy copy is hand-delivered or transmitted by e-mail. (See ¶ 4, above). If counsel are unable to file appropriate documents by this deadline, they shall appear as scheduled to recite the settlement

terms on the record.

- 6) **Partial Case Settlement/Dismissal**: If fewer than all claims, defenses or parties are resolved by a settlement, the motion requesting approval of same shall specify what claims, defenses or parties will be affected by the settlement/dismissal and which will remain. The proposed order shall set out a revised caption, deleting parties whose claims have been resolved, to be used on all subsequent pleadings.
- 7) **Motions**. All **unopposed motions** must be designated as such in compliance with the local rules of practice and **must be accompanied by a proposed order**. If no proposed order is submitted, the motion may be deemed abandoned and, therefore, denied. Unless designated as unopposed, or in exceptional circumstances apparent on the face of the document, motions will not be considered until after the response and reply period has passed.

All motions in civil cases (other than matters involving prisoners) must comply with D.C.COLO.LCivR 7.1. Failure to comply will result in denial of the motion.

- 8) **Emergency Hearings**. Requests for an expedited hearing due to the emergency nature of a motion should be made by separate request filed with the motion. The request for an expedited hearing should reflect that expedited notice was given to the opposing party(ies) or contain an explanation as to why such notice could not be given. Provide a courtesy copy in accordance with ¶ 4, above.

C. Courtroom Protocol.

- 1) **Court Appearances**. Court time is a judicial resource which is valuable not only to parties and counsel in a particular action, but also to parties and counsel in every other action before the court. As officers of the court, counsel must be cognizant of the consumption of this resource and its effect on all other pending cases. Please be prompt and prepared. If a scheduled matter is called for hearing and a party or party's counsel is not present, the matter may be moved to the end of the docket, reset, a default entered, sanctions imposed, or other orders entered as appropriate. If a party is not prepared to proceed, or if the matter has been resolved and the parties have not timely advised the court, sanctions may be imposed.

Counsel are professionals who are expected to set a tone of dignity and decorum at all times. Disruptive tactics, appeals to prejudice, or personal attacks against other counsel, parties, or witnesses are not acceptable. Colloquy between counsel on the record is not permitted. All remarks should be addressed to the bench, jury or witness. Because all persons are equal before the law, parties and counsel are to be addressed by surname preceded by Mr. or Ms. Counsel should not introduce themselves to a witness when beginning examination. Counsel may

describe the evidence they believe will be admitted in opening statement, but may not use anticipated exhibits. In closing argument, counsel may not express personal opinions, ask jurors to place themselves in the position of a party, or refer to evidence that was not presented. Normally, the jury will be instructed before closing arguments and therefore there should be no need to explain the law.

- 2) **Courtroom Organization.** Plaintiff's table is closest to the jury box. There is one lectern in the courtroom. Adjacent to the lectern are electronic document display machines (ELMO system). Counsel table, the witness box and the jury box all have video display monitors. Microphones are strategically placed at the witness stand, counsel table and the jury box.

Counsel should make all statements or objections from the lectern. Rather than handing a witness an exhibit, counsel should direct the witness to the appropriate exhibit or display it on the monitor. In jury trials, bench conferences should be minimized; matters to be considered outside the presence of the jury may be raised before or after the trial day or during recesses.

- 3) **Recording of Proceedings.** The official record of all trials and proceedings will be taken by a reporter. Prior to the beginning of any proceeding, please provide the reporter with your business card and a list of unusual or technical vocabulary which will be used in testimony or argument. The reporter working with me is **Paul Zuckerman (303) 629-9285**. Transcripts of proceedings may be ordered from him. Requests for real time, daily or hourly copy must be made at least **30 days** before the trial or hearing date. Further details can be obtained from Mr. Zuckerman.

- 4) **Evidence Presentation.** This courtroom is equipped for evidence presentation by a variety of methods. The courtroom has the capability for testimony to be received by video connection, depositions by video, video (CD or tape) evidence presentation, computer evidence presentation and overhead presentation of documents through ELMO. Utilization of the equipment available in the courtroom requires training. To obtain training to use the equipment contact **Valeri Barnes at (303) 335-2087** at least **30 days** before the hearing or trial.

For trials in both civil and criminal matters, the designation and exchange of exhibits and designation of witnesses will be controlled by the Trial Preparation Order entered in the case.

For evidentiary hearings on motions, all exhibits must be exchanged, unless otherwise ordered, no later than **five business days** prior to the hearing. Absent a

stipulation between the parties or demonstration of extraordinary circumstances, exhibits not timely exchanged prior to the hearing will not be admitted. Pursuant to the Trial Preparation Order, exhibits at trial will be sequentially numbered. Trial exhibits will not be designated as “Plaintiff’s Exhibit ____” or “Defendant’s Exhibit ____”.

Exhibits to be used for a hearing on a motion shall be marked as follows:

<u>Numbers</u>	<u>Letters</u>
Plaintiff	Defendant (A1 thru Z1, A2 thru Z2, etc.)
Movant	Respondent
Appellant	Appellee

Exhibits must be bound, such as in three-ring notebooks or folders, and the notebook or folder labeled with the following information: (i) caption, (ii) nature of proceeding, (iii) scheduled date and time, (iv) party’s name and designation and (v) “original” or “copy”. Sets of exhibits must be brought to the hearing or trial for the Court and the witness stand. If exhibits are not suitably bound and labeled, the hearing may be delayed or continued until they are.

D. Civil Cases.

- 1) **Pre-trial Scheduling.** After a jurisdictional review, most civil cases are referred to a magistrate judge for certain pretrial preparation. Counsel should be familiar with the scope of the reference designated in the order of referral which will help guide counsel in determining whether a matter will be handled by the magistrate judge or by the district judge. **Do not assume** that matters handled by one judge will be known to the other. Indeed, because the magistrate judge may assist in settlement, certain matters will not be disclosed by the magistrate judge to the district judge.

A Rule 16 conference will be conducted either by me or by the magistrate judge to whom the case is assigned. At or shortly after the Rule 16 conference, a pretrial scheduling order will be issued. Such order will set all pretrial deadlines as well as the final trial preparation conference date and the trial. The total schedule is designed to provide adequate time for pretrial preparation and provide the parties with the earliest trial date possible.

Magistrate judges have been directed not to set a dispositive motion deadline less than 120 days before the trial date. Counsel should be aware that if they move to extend the dispositive motion date or request extensions of time to respond or reply to the dispositive motion, there may not be adequate time to fully consider the dispositive motion prior to trial.

- 2) **Trial Scheduling.** The magistrate judge may, with the input of counsel, obtain a trial date from chambers by telephone, or the magistrate judge may instruct the parties to visit chambers to obtain a trial date. Every effort will be made to schedule trials at the earliest firm date possible with deference to the calendars of counsel, parties and witnesses. Trial dates will not be routinely continued, however, trials in civil cases scheduled on a trailing docket or subject to a criminal trial may have to be continued. In such event, the oldest set case has priority for the trial date. The next matter may be held “on deck” until thirteen days before the trial date. If a trial is continued, the continued case will receive priority in resetting.

To determine the appropriate amount of time necessary for trial, counsel should consider the number of hours required to present testimony and the time necessary for administrative matters.

One week jury trials run Monday through Friday, but *voir dire* does not usually begin until late morning or early afternoon on Monday. This means that presentation of evidence usually does not begin until Tuesday morning. If a jury trial requires more than one week, the second week will begin in the afternoon on Monday or on Tuesday. In a jury trial, the process of *voir dire* (conducted by the judge), preliminary instructions and opening statements (generally limited to 15 minutes per side) usually requires at least two to three hours. Charging instructions to the jury and closing arguments (generally limited to 30 minutes per side) usually require at least two hours. Trials begin between 8:30 and 9:00 a.m. and end between 4:00 and 4:30 p.m. They are punctuated with a mid-morning break, mid-afternoon break and a lunch break of one to one and one-half hours. This means that there is approximately six to six and one-half hours per day for presentation of evidence and argument by counsel. Thus, counsel can expect that in a one week jury trial there will be approximately 22 to 23 hours available for presentation of evidence and argument, and the case will be submitted to the jury on Friday afternoon.

Bench trials generally run Tuesday through Friday with the same hours as jury trials.

Approximately 100 days before trial, the Court will issue a Trial Preparation Order which confirms the trial preparation conference date and the trial date and specifies all tasks which must be completed before such date. All motions *in limine* and *Daubert* motions should be filed in conformance with the Trial Preparation Order. It is essential that counsel be fully prepared for trial at the time of the trial preparation conference and that counsel fully comply with the Trial Preparation Order. Failure to strictly comply with the Trial Preparation Order may result in vacation of the trial date or imposition of other sanctions in accordance with Rule 16 and Rule 37.

- 3) **Hearings**. Motions may be determined without a hearing, set for a specified evidentiary/oral argument hearing, or set for a law and motion hearing. At a law and motion hearing, the matters will be set for no more than 15 minutes. The purpose of such hearing is either to set appropriate preparation deadlines for an evidentiary hearing or to hear brief oral argument. Please confer with opposing counsel to determine whether an evidentiary hearing is required and, if so, of what duration. If only oral argument is made, it will be limited to 15 minutes total.
- 4) **Dispositive Motions**. Motions seeking relief pursuant to FED.R.CIV.P. 12 or 56 are governed by D.C.COLO.LCivR. 7.1(C) and 56.1. Deadlines will be strictly applied. The movant shall file a motion and brief. The respondent may file a response and brief. No page limits on the motions or response are imposed, but counsel are urged to be concise. **Counsel are required to use the following formats for motions and responses. Failure to do so will result in denial.** Absent prior leave of court, briefs shall be limited to **20 pages**. If you request leave to exceed the brief page limitation, do so before filing the brief; otherwise, if leave is not granted, only the permitted pages will be reviewed.

- **FED.R.CIV.P. 12(b)(1-5)**

Motions brought pursuant to these provisions shall identify the grounds for dismissal with the burden of proof, the material facts and whether materials outside the pleadings should be considered. Responses shall address the particulars of the motion.

- **FED. R. CIV. P. 12(b)(6)**

Rule 12(b)(6) motions are not favored if the defect is correctable by the filing of an amended pleading. Counsel shall confer under Local Rule 7.1(A) prior to the filing of the motion and stipulate to appropriate curative amendments. For Rule 12(b)(6) motions where a bar to the action is alleged, the movant's response should follow the procedure for Rule 12(b)(1-5) motions. For Rule 12(b)(6) motions challenging the adequacy of pleading, the following format should be used:

I. Claim (*which movant seeks to have dismissed*).

- A. Each element (*which movant contends must be, but was not, alleged*).

The respondent should utilize the same format in its response for each challenged claim. If the respondent disputes that a particular element must be alleged, the element should be identified as DISPUTED and argument provided in the brief. If the respondent contends that a proper and sufficient factual allegation has been

made in the complaint, the respondent should identify the page and paragraph containing the required factual allegation.

- **FED. R. CIV. P. 56**

With regard to all Rule 56 motions, the following format shall be used. Remember the burden of proof and the elements are not set out in Rule 56. They are, instead, determined by the claim on which you seek judgment and the applicable law. For clarification or further information see the examples posted and *In re Ribozyme*, 209 F. Supp. 2d 1106 (D.C.Colo. 2002).

- I. Claim/Defense (*upon which judgment is requested*).
 - A. Party having the burden of proof.
 - B. Separate identification of each element (*for which the movant bears the burden of proof or, if the respondent bears the burden of proof, which the movant contends the respondent cannot prove*). Separately, for each identified element, state the undisputed or admitted fact(s) pertaining to that element and the location of such fact(s) in the record.

The respondent should utilize the same format for each claim/defense in the response. If the respondent disputes the burden of proof or that an identified element is such, the respondent should simply identify the burden of proof or element as DISPUTED. If there is no dispute as to the burden of proof, or to an element, for each identified element the respondent should identify any material facts in dispute and where such facts are found in the record. Legal argument should be set forth in a separate brief.

Motions for partial summary judgment on some, but not all, legal theories arising from a single factual scenario are not favored unless, if granted:

- (a) Rule 54(b) will be employed to certify same for appeal; or
- (b) the scope of evidence to be presented at trial will be significantly reduced.

All motions for partial summary judgment shall state whether these circumstances are applicable and, if so, describe the impact of a favorable determination of the motion on the administration of the case.

D. Criminal Cases.

- 1) **Trial Settings.** Counsel may obtain trial dates from chambers following arraignment of the defendant(s) before the magistrate judge. To determine the appropriate amount of time necessary for trial, counsel should compute the number of hours required to present testimony and for administrative matters. (*See*, ¶ D, 2), above.) After the trial date is set, a Notice and Order of Initial settings which sets motions deadlines, a motions hearing, and the procedure for plea agreements will be issued.
- 2) **Motions.** The Notice and Order of Initial Settings sets two motion filing deadlines. The first deadline is for filing of pretrial motions other than motions to suppress; the second is for filing responses to pretrial motions and motions to suppress. If no motions are filed, the motions hearing will **automatically be vacated without notice**. The filing of all other motions (*i.e.*, motions to continue, motions to amend conditions of bond/pre-trial release) should follow the procedures set forth in Section B, ¶¶ 5, 7 and 8), above. Please make every effort to resolve pending motions before the motion hearing. File appropriate documents to resolve or withdraw motions in conformance with ¶ B, 5 if there is no dispute to be determined. If all motions have been resolved, it is a waste of time and resources to proceed with a motions hearing.
- 3) **Plea Agreements.** A Notice of Disposition shall be filed **no later than 14 days** before the trial date. Hearings for changes of plea can be routinely scheduled for the second and fourth Mondays of each month. If the second or fourth Monday falls on a holiday, the Tuesday following the holiday will be the designated change of plea hearing date. The parties shall select and stipulate to have the change of plea heard at a regularly scheduled change of plea hearing date prior to the trial date and shall contact **Janine Aguero** at **(303) 335-2289** to obtain a time for the hearing. Such hearing date and time shall be identified in the first paragraph of the Notice of Disposition. If there is no regularly scheduled change of plea hearing date available prior to the trial, the parties shall so state and request one. **Immediately** upon filing, the Defendant shall serve the Notice of Disposition upon: 1) Charlotte Hoard, Courtroom Services Supervisor; 2) U.S. Marshals Service; and 3) Pretrial Services and Probation. The plea agreement will be considered at the time selected by the parties unless they are otherwise notified by the Court.
- 4) **Trial Preparation Order.** After the motions deadline has expired, if no notice of disposition has been filed, a Trial Preparation Order will be issued.